SUPREME COURT, U. S.
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No. 73-64

In the Supreme Court of the United States

OCTOBER TERM, 1973

ROBERT E. IANNELLI, ET AL., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners challenge the validity of a court ordered wire interception on the ground that proper procedures were not followed within the Department of Justice for authorizing the submission to the court of the application for the wire interception order. They also contend that the indictment and punishment for violation of both 18 U.S.C. 371 and 1955 was improper.

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioners were convicted of conspiring with ten unindicted co-conspirators to conduct an illegal gambling business in violation of 18 U.S.C. 371, and of conducting such business in violation of 18 U.S.C. 1955. Petitioner Iannelli was also convicted of sending gambling paraphernalia through the mail and mail fraud in violation of 18 U.S.C. 1302 and 1342.[1] On the substantive counts,

[1] The jury was unable to reach a verdict as to one codefendant, who was retried and convicted. See *Dolores Iannelli* v. *United States*, No. 73-103, petition for certiorari pending. Four other codefendants were acquitted.

petitioner Iannelli was fined a total of $22,000 and one-eighth of the cost of the prosecution and sentenced to concurrent two and three year terms of imprisonment to be followed by a five year probation term; petitioners Diulus, Orlanski and Scolieri were each fined $15,000 and one-eighth of the cost of prosecution and sentenced to a two year term of imprisonment to be followed by a three year probation term; petitioner Fusaro was fined $10,000 and one-eighth of the cost of prosecution and sentenced to an eighteen month term of imprisonment, suspended on condition that he spend six months in a jail-type institution to be followed by a three year probation term; petitioners Cancilla, Cammarata and Gobos were each fined $10,000 and one-eighth of the cost of prosecution and sentenced to an eighteen month term of imprisonment, suspended on condition that they spend three months in a jail-type institution to be followed by a three year probation term. On the conspiracy count, each petitioner was sentenced to a five year probation term to commence after imprisonment and to run concurrently with the other probation term imposed. The court of appeals affirmed (Pet. App. 23a-27a).

The evidence, much of which was based on a court ordered wire interception, showed that in the period between October 16, 1970 and March 25, 1971, petitioners conspired with ten others to and did receive and disseminate line and point-spread information; they also accepted more than $2,000 per day worth of bets and wagers on sporting events. These activities were in violation of the laws of the Commonwealth of Pennsylvania, Section 4601 and 4607, Title 18, Purdon's Pennsylvania Statutes.

1. The wire interception evidence in this case was obtained from a court authorized interception conducted

pursuant to Title III, Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510-2520). The general procedure under which the application for the wire interception order was authorized is set forth in our brief and petition in *United States* v. *Giordano*, No. 72-1057, certiorari granted March 26, 1973. In the instant case the government showed by affidavits and depositions that the wiretap application was personally approved by then Attorney General John N. Mitchell who personally initialed the authorization memorandum.[2]

Under the standard procedure which was followed in this case, the Attorney General approved the application for an interception order. A letter was then dispatched to the attorney in the field notifying him that he was authorized to apply for the interception order. Such letters were sent in the name of Assistant Attorney General Will Wilson, and attached to the application. These letters seemed to indicate, erroneously, that it was Assistant Attorney General Will Wilson who was authorizing the application. Mr. Wilson's signature was affixed to these letters by one of his two Deputy Assistant Attorneys' General in accordance with the authorization of Mr. Wilson and the standard procedure of the Criminal Division.[3]

Petitioner claims that the evidence from the wire interceptions should have been suppressed because the authorization and identification procedures within the Department of Justice did not comply with the statute.

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[2] Contrary to petitioners' claim that the record contains a "mere assumption" that the Attorney General personally authorized the application (Pet. 5), the district court specifically so found on the basis of adequate evidence (Pet. App. 3a-4a).

[3] Mr. Wilson's signature was affixed in this case by former Deputy Assistant Attorney General Henry E. Petersen.

As petitioner points out, this case presents the same issues which are before this court in *United States* v. *Chavez*, No. 72-1319, certiorari granted May 21, 1973, and *United States* v. *Giordano*, No. 72-1057, certiorari granted March 26, 1973. Therefore, the disposition of this issue in the instant case should await the disposition of those cases.

2. Petitioners also argue that 18 U.S.C. 371 and 18 U.S.C. 1955 do not charge different offenses, and therefore, under "Wharton's rule" it was improper to prosecute and punish them for both the conspiracy and the substantive offenses.

Wharton's rule states that "where it is impossible under any circumstances to commit the substantive offense without cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy either at common law, * * * or under the federal statute." *Gebardi* v. *United States*, 287 U.S. 112, 122 (citations omitted). We have found no case in which that rule has been applied by this Court.

Instead, in *Callanan* v. *United States*, 364 U.S. 587, 593-594, the Court emphasized the importance of the general principle permitting separate punishment for conspiracy and for the substantive offense:

> This settled principle derives from the reason of things in dealing with socially reprehensible conduct: collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.

See also *United States* v. *Rabinowich*, 238 U.S. 78, 88; *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 923-925, 955-956 (1959).

In any event, Wharton's rule, which is a narrow exception to this general principle, is inapplicable to the facts of this case, since it is possible to commit the substantive offense condemned by 18 U.S.C. 1955 without cooperative illegal action.[4] Although 18 U.S.C. 1955(b)(ii) requires that the gambling business involve five or more persons, there is no requirement that these persons conspire together to commit an offense against the United States. Thus, 18 U.S.C. 1955 could be violated by a single gambling operator who used four or more innocent people to collect receipts or otherwise unknow-

[4] Cf. *United States* v. *Bobo* Nos. 71-2077, 2078, 2079 (C.A. 4), decided April 23, 1973, petition for certiorari pending *sub nom. Gray* v. *United States*, No. 73-231, in which the court concludes that Wharton's rule does not apply to a conspiracy to violate 18 U.S.C. 1955. Instead, the court notes, the rule applies only when the following elements coexist: "the immediate effect of the act in view, which is the gist of the substantive offense, reaches only the participants therein; the agreement of the participants is necessary for the completion of the substantive offense; and the conspiracy must be in such close connection with the substantive offense as to be inseparable from it" (slip op. 35).

ingly further his enterprise. There is no indication in the legislative history of 18 U.S.C. 1955 that Congress intended the jurisdictional requirement of group activity by five or more individuals to entail proof of an agreement among those individuals to violate the gambling laws. H. Rep. No. 91-1549, 91st Cong., 2nd Sess., 1970 U.S. Code Cong. & Adm. News 4029-4030. Instead, the requirement related only to the determination whether the gambling activity was substantial enough to warrant federal prosecution. In such circumstances, it is particularly inappropriate to make the assumption which underlies Wharton's rule that the legislature intended, by defining a substantive offense which necessarily requires illicit cooperation, to preclude the applicability of conspiracy sanctions to that activity. Because each offense involves an element not required by the other, it was proper to charge and punish each separately. *Blockburger* v. *United States*, 284 U.S. 299, 304; *Pinkerton* v. *United States*, 328 U.S. 640, 643-644.

Even if 18 U.S.C. 1955 were held to require proof of an agreement among the five participants to commit a gambling offense, many more than five participants are involved here. Wharton's rule does not apply when non-essential participants are involved in the conspiracy or the substantive offense. *United States* v. *Becker*, 461 F. 2d 230, 234 (C.A. 2), petition for certiorari pending, No. 72-158.[5] 1 Anderson, *Wharton's Criminal Law and Procedure*, Section 89, p. 193 (1957); 2 *Wharton's Criminal Law*, Section 1604, p. 1862 (12th ed. 1932). Thus, we submit that the court below correctly disposed of this issue.

[5] The issue of the applicability of Wharton's rule is not raised in the petition for certiorari.

We recognize, however, that the opinion below is inconsistent with the decision of the United States Court of Appeals for the Seventh Circuit in *United States* v. *Hunter*, petition for certiorari pending, No. 73-101.[6] The court in *Hunter* refused to follow the decision in *United States* v. *Becker*, 461 F. 2d 231 (C.A. 2), which held Wharton's rule inapplicable to a violation of 18 U.S.C. 1955 involving more than five persons.[7] Because of the conflict in the circuits and the significance of this issue to the interpretation of 18 U.S.C. 1955, we do not oppose the granting of a writ of certiorari in this case.

The Court may wish to defer disposition of this petition until after the decisions in *United States* v. *Giordano*, *supra*, and *United States* v. *Chavez*, *supra*. Alternatively, we suggest the Court may wish to grant the petition now, with the understanding that the parties will brief and argue the issue of the applicability of Wharton's rule only, reserving the issue concerning the authorization of the interceptions to be controlled by the decisions in *Giordano* and *Chavez*.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

[6] The government's request for an extension of time to cross-petition on this issue in *Hunter* was denied by Mr. Justice Rehnquist on July 9, 1973.

[7] As already noted, *United States* v. *Bobo* (C.A. 4), *supra*, petition for certiorari pending *sub nom. Gray* v. *United States*, No. 73-231, is in accord with *Becker* and the decision below. Two district court cases in other circuits reached the same result as the court in *Hunter*. See *United States* v. *Figueredo*, 350 F. Supp. 1031 (M.D. Fla.), notice of appeal filed December 9, 1972; *United States* v. *Greenberg*, 334 F. Supp. 1092 (N.D. Ohio).